Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CROWN CORK & SEAL CO., INC.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 8, 1994

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QUESTION PRESENTED

Whether civil actions under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, are subject to the six-month statute of limitations of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to petitioner Crown Cork & Seal Company, Inc. ("Crown") and respondent United Steelworkers of America, AFL-CIO-CLC (the "Union"), the Chamber of Commerce of the United States of America appeared in the Court of Appeals as *amicus curiae* in support of Crown. Crown has no parent company. Crown subsidiaries (other than wholly owned subsidiaries) are Crown Cork Company (Belgium) N.V., Crown Can Hong Kong, Ltd., The Crown Cork Company (East Africa) Ltd., Crown Cork del Peru, S.A., Crown Cork & Seal (Thailand) Co., Ltd., Emirates Can Company, Ltd. (Dubai, UAE), Crown Cork Company (Zambia) Limited, and Crown Cork Company (1958) (Pvt) Limited.

In the Court of Appeals, this case was consolidated with *Thomas v. North Star Steel Co.*, No. 93-7613, in which the following parties appeared: Charles A. Thomas, Darren Boop, Robert W. Bower, William D. Bridge, James Clingan, Neal B. Housner, Jonathan L. Noaker, Wayne D. Orner, Gerald W. Ranck, Harold E. Van Sickle, Jr., Richard A. Winter, Eugene L. Witmer, Sr., North Star Steel Company, and, as *amici curiae*, the Chamber of Commerce of the United States of America; the Oil, Chemical and Atomic Workers International Union; the United Mine Workers of America; the NLG/Sugar Law Center for Economic & Social Justice; and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT	2
A. Statutory Framework	2
B. Facts and Proceedings Below	3
REASONS FOR GRANTING THE PETITION	5
I. THE CONFLICT BETWEEN THE DECISIONS OF THE SECOND AND THIRD CIRCUITS AND THE DECISIONS OF THE FIFTH AND SIXTH CIRCUITS SHOULD BE RESOLVED BY THIS COURT AS SOON AS POSSIBLE	6
II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE ANALYTICAL FRAMEWORK ESTABLISHED BY THIS COURT FOR DECIDING A LIMITATIONS BORROWING QUESTION	10
III. THE DECISION BELOW IS WRONG	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES — Page

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 148 (1987) 8, 10, 12, 13, 15
Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Services, Inc., 830 F. Supp. 432 (N.D. Ill. 1993) 9
Chippewa Motor Freight, Inc., 261 N.L.R.B. 455 (1982) 14
DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 11, 12
First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) 13
Frymire v. Ampex Corp., 821 F. Supp. 651 (D. Colo. 1993) 9
Halkias v. General Dynamics Corp., 31 F.3d 224 (5th Cir. 1994), *reh'g en banc granted*, 1994 WL 520351 (5th Cir. Sept. 22, 1994) 5, 7, 8, 9, 12, 13
Halkias v. General Dynamics Corp., 825 F. Supp. 123 (N.D. Tex. 1993), *aff'd*, 31 F.3d 224 (5th Cir. 1994), *reh'g en banc granted*, 1994 WL 520351 (5th Cir. Sept. 22, 1994) 9
Harper v. Virginia Department of Taxation, 113 S. Ct. 2510 (1993) 5, 10
Kirkwood Fabricators, Inc. v. NLRB, 862 F.2d 1303 (8th Cir. 1988) 14
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) 10, 11, 13, 14
Los Angeles Soap Co., 300 N.L.R.B. 289 (1990) 14
National Car Rental System, Inc., 252 N.L.R.B. 159 (1980), *modified and enforced*, 672 F.2d 1182 (3d Cir. 1982) 14
Newspaper & Mail Deliverers' Union v. United Magazine Co., 809 F. Supp. 185 (E.D.N.Y. 1992), *judgment entered*, 829 F. Supp. 561 (E.D.N.Y. 1993) 9
Penntech Papers, Inc. v. NLRB, 706 F.2d 18 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983) 13
Reed v. United Transportation Union, 488 U.S. 319 (1989) 11

TABLE OF AUTHORITIES—Continued

	Page
Staudt v. Glastron, Inc., 8 Indiv. Empl. Rights Cas. (BNA) 462 (W.D. Tex. Feb. 23, 1993), *aff'd*, 31 F.3d 224 (5th Cir. 1994), *reh'g en banc granted*, 1994 WL 520351 (5th Cir. Sept. 22, 1994)	9
Thomas v. North Star Steel Co., No. 4: CV-92-1507 (M.D. Pa. May 25, 1993), *rev'd*, 32 F.2d 53 (3d Cir. 1994)	9
United Mine Workers of America v. Peabody Coal Co., No. 93-6020, 1994 WL 590188 (6th Cir. Oct. 31, 1994)	5, 7
United Mine Workers of America v. Peabody Coal Co., No. 92-CV-73 (W.D. Ky. 1993), *aff'd*, 1994 WL 590188 (6th Cir. Oct. 31, 1994)	9
United Paperworkers International Union v. Specialty Paperboard, Inc., 999 F.2d 51 (2d Cir. 1993)	4, 5, 6, 7, 11
Wallace v. Detroit Coke Corp., 818 F. Supp. 192 (E.D. Mich. 1993)	9
Wilson v. Garcia, 471 U.S. 261 (1985)	13, 15

STATUTES AND REGULATIONS

20 C.F.R. § 639.1(a)	2, 14
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1292(b)	1
28 U.S.C. § 1331	3
29 U.S.C. § 160(b)	*passim*
29 U.S.C. § 185	11
29 U.S.C. § 411(a)(2)	11
29 U.S.C. § 2101(a)(2)	2
29 U.S.C. § 2101(a)(3)	2
29 U.S.C. § 2101(a)(6)	2
29 U.S.C. § 2102(a)	2
29 U.S.C. § 2102(b)	2, 14
29 U.S.C. § 2102(d)	2
29 U.S.C. § 2104	2
29 U.S.C. § 2104(a)(1)(A)	14
29 U.S.C. § 2104(a)(5)	3, 13
Ga. Code Ann. § 9-3-22	4

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OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra,* 1a-16a) is reported at 32 F.3d 53. The opinion of the District Court on the merits (App., *infra,* 17a-23a) is reported at 833 F. Supp. 467, and its order certifying the legal issue for immediate appeal under 28 U.S.C. § 1292(b) (App., *infra,* 24a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision is the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, which is reproduced in full in the Appendix (App., *infra,* 25a-33a).

STATEMENT

A. Statutory Framework

Congress enacted the Worker Adjustment and Retraining Notification Act (the "WARN Act"), 29 U.S.C. §§ 2101-09, in 1988 to provide unions, employees and local governments with advance notice of impending plant closings and mass layoffs. *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a). The WARN Act generally requires employers to provide sixty days' notice of a mass layoff or plant closing to affected employees (or their union representative) and to the local government. *Id.* The notice period may be reduced if, for example, a mass layoff or plant closing results from unforeseeable business circumstances or from a natural disaster, or if an employer had been seeking business or capital to avert the closing or layoff. 29 U.S.C. § 2102(b).

A statutory plant closing or mass layoff occurs where a minimum number of employees suffer an "employment loss" within a 30-day (or in some circumstances 90-day) period. 29 U.S.C. §§ 2101(a)(2)-(3), 2102(d). The WARN Act defines "employment loss" as a termination, a layoff exceeding six months, or a 50% reduction in work hours for each month of a six-month period. 29 U.S.C. § 2101(a)(6). Hence, affected employees will be aware of a possible WARN Act claim no later than six months after a plant closing or mass layoff.

The WARN Act creates a private cause of action for employees and their union representatives, who can sue an employer for statutorily-specified money damages in any district where the employer transacts business. 29 U.S.C. § 2104. The Act, however, does not specify the

statute of limitations that governs such claims. Accordingly, under the WARN Act, there is a need to borrow a limitations period from elsewhere.

B. Facts and Proceedings Below

On or about September 30, 1991, Crown ordered a layoff at and shutdown of its unionized manufacturing plant in Perry, Georgia. As a result, Crown laid off approximately eighty-five Union-represented employees at the plant. The Union alleges that Crown failed to provide it with 60 days' advance notice of this action. The Union, however, waited until October 15, 1992, more than a year after the shutdown, to file suit against Crown. The Union did not file suit in Georgia, where the shutdown occurred, but instead chose to sue in the United States District Court for the Eastern District of Pennsylvania.[1]

Crown moved for summary judgment on the ground that WARN Act claims were subject to the six-month statute of limitations borrowed from Section 10(b) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 160(b), and that Union's suit was therefore time-barred.

Although the District Court acknowledged that "there are cases going both ways on the question of whether state law or § 10(b) of the NLRA provides the appropriate limitations period for a civil suit under WARN," it ruled that a Pennsylvania state limitations period governed the Union's WARN Act claim (App., *infra*, 21a-22a). However, the Court declined to decide which Pennsylvania limitations period applied (*id.* at 22a), perhaps because it could not identify any Pennsylvania statute that was even remotely analogous to the WARN Act. The district court then certified its decision for immediate appeal (*id.* at 24a).

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[1] The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 2104(a)(5).

The United States Court of Appeals for the Third Circuit affirmed (App., *infra,* 1a-16a). The Court reached this result even though it recognized that the NLRA, like the WARN Act, required an "employer [to] provide notice [of plant closings] to represented workers," and that the WARN Act "has a family resemblance to the NLRA" (*id.* at 10a). Moreover, the Court of Appeals affirmed even though it found that none of four Pennsylvania limitations periods suggested by the plaintiffs "provide perfect analogies to WARN," and even though it refused to decide which of at least four possible state limitations periods applied (*id.* at 15a-16a).

The Court of Appeals also acknowledged that WARN Act claims would likely be governed by a limitations period from the forum in which employees filed suit, and that, in this case, the Union opted to sue in Pennsylvania for an alleged violation which occurred in Georgia (*id.* at 14a n.4). Nonetheless, the Court downplayed the risk of forum shopping created by its refusal to adopt a uniform limitations period. And, despite the fact that the limitations period could vary from at least two to six years in Pennsylvania (*id.* at 15a) to as much as twenty years in Georgia, *see* Ga. Code Ann. § 9-3-22 (twenty-year limitations period for claim under statute), the Court of Appeals asserted that " 'workers will gain few advantages by suing in a court far from the site of injury' " (*id.* at 14a) (quoting *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51, 56 (2d Cir. 1993)).

REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve an important and recurring question of federal labor law that, despite exhaustive briefing in four Circuits, has deeply and irreconcilably split the Courts of Appeals. The court below aligned itself with the United States Court of Appeals for the Second Circuit in holding that WARN Act claims should be governed by state limitations periods. (App., *infra,* 16a); *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51, 57 (2d Cir. 1993).

These holdings and their underlying rationales conflict with and have been expressly rejected by decisions of the United States Court of Appeals for the Sixth Circuit in *United Mine Workers of America v. Peabody Coal Co.*, No. 93-6020, 1994 WL 590188 (6th Cir. Oct. 31, 1994) and the United States Court of Appeals for the Fifth Circuit in *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *reh'g en banc granted,* 1994 WL 520351 (5th Cir. Sept. 22, 1994). Both the Sixth and Fifth Circuits held that WARN Act claims were governed by the six-month limitations period of Section 10(b) of the NLRA, because the NLRA offers the *only* close analogy to the WARN Act in state *or* federal law, and because a uniform federal limitations was needed to avoid uncertainty, forum shopping, and costly collateral litigation. *See Peabody Coal,* 1994 WL 590188, at *7; *Halkias,* 31 F.3d at 235-38. Because resolution of this circuit split will likely have retroactive effect, *see, e.g., Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993), substantial benefit would be gained from prompt review by this Court.

This Court should also grant review to make unmistakable the process by which the lower federal courts determine whether to borrow a limitations period from state or federal law. This Court has held that a court must consider *both* state and federal statutes to determine which provides a better analogy to the cause of action at issue, but lower courts have not consistently applied this analy-

sis. For example, in this case, the Third Circuit refused to borrow a limitations period from the NLRA because, in its view, the NLRA was not a sufficiently perfect analogy to the WARN Act. The Third Circuit reached this conclusion, however, without even considering whether state law provided any analogy at all to the WARN Act. This approach inevitably leads to state law borrowing in every instance, because no two federal causes of action are identical. In light of the lower courts' inability to properly apply this Court's statute of limitations borrowing decisions, further guidance is necessary.

Finally, this Court should grant review because the Third Circuit's decision is simply wrong. The Third Circuit failed to recognize that the NLRA, unlike any state law, provides a close analogy to the WARN Act and that state-law borrowing would encourage forum shopping and time-consuming and expensive collateral litigation.

I. THE CONFLICT BETWEEN THE DECISIONS OF THE SECOND AND THIRD CIRCUITS AND THE DECISIONS OF THE FIFTH AND SIXTH CIRCUITS SHOULD BE RESOLVED BY THIS COURT AS SOON AS POSSIBLE

To date, four Circuits have considered which limitations period governs WARN Act claims. In the present case, the Third Circuit held that a limitations period should be borrowed from state law, but it refused to identify which of at least four possible state limitations periods governed (App., *infra,* 15a-16a).

The Second Circuit also held that WARN Act claims were governed by state limitations periods. *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.,* 999 F.2d 51, 57 (2d Cir. 1993). The Second Circuit acknowledged that no state law was "perfectly analogous to WARN," but it decided that Vermont's six-year contract limitations period applied to WARN Act claims. *Id.* The court reasoned that WARN Act claims were analo-

gous to workers' compensation claims, which were governed by the Vermont contract limitations period. Because this analogy was not wholly convincing, the court also suggested that WARN Act claims were akin to claims of promissory estoppel. *Id.*

In contrast, the Sixth Circuit has held that WARN Act claims are governed by the six-month limitations period of Section 10(b) of the NLRA. *United Mine Workers of America v. Peabody Coal Co.*, No. 93-6020, 1994 WL 590188 (6th Cir. Oct. 31, 1994). The Sixth Circuit reasoned that a uniform limitations period for WARN Act claims was desirable, because there was no obvious state-law analogy to the WARN Act and because the Act's broad venue provision would otherwise encourage forum shopping. *Id.* at *6-7. The Sixth Circuit then ruled that the NLRA provided a closer analogy to the WARN Act than any state statute: "[D]espite admitted differences between WARN and the NLRA, both are designed to afford protection against job loss—a safeguard that goes to the heart of the employment relationship." *Id.* at *7. Finally, the Sixth Circuit held that a six-month limitations period was consistent with the WARN Act's "aim of starting employees on the road to retraining and reemployment before unemployment becomes a problem." *Id.*

Likewise, the Fifth Circuit held that WARN Act claims were governed by the six-month limitations period of Section 10(b) of the NLRA. *Halkias v. General Dynamics Corp.*, 31 F.3d 224, 228 (5th Cir. 1994), *reh'g en banc granted*, 1994 WL 520351 (5th Cir. Sept. 22, 1994). The Fifth Circuit observed that "WARN and the NLRA share similar structures" and language, 31 F.3d at 231, and that both statutes require employers to notify unions of impending plant closures, *id.* at 232. The Fifth Circuit noted that this Court has borrowed limitations periods from federal statutes with "similarities in purpose and structure," and it criticized the Second and Third Circuits for requiring a "strict identity of purposes" between the

NLRA and the WARN Act. *Id.* at 233 (citing *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 148, 156 (1987)).

The Fifth Circuit then determined that no state limitations period was as analogous to the WARN Act as the NLRA:

> None [of the state limitations periods] seeks to accommodate the same, or very similar, interests as WARN, much less govern an action that will frequently overlap with WARN. And, needless to say, none embraces causes of action that share common language with WARN.

Id. at 236 (footnotes omitted).

The Fifth Circuit also noted that, because courts generally borrow a limitations period from the forum state, the WARN Act's expansive venue provision would lead to forum shopping. *Id.* at 237. In addition, the Court observed that WARN Act class actions could involve claims from facilities in multiple states,[2] and the Court concluded that "valuable time and resources should not be consumed litigating" which state's limitations periods applied. *Id.* at 237-38. Finally, the Fifth Circuit ruled that the NLRA's six-month limitations period was appropriate, because "federal labor policy has long favored the rapid settlement of disputes between an employer and an employee," and because a lengthy limitations period "could create untold problems concerning the availability of evidence." *Id.* at 238.

The question presented by this petition has been fully briefed in four Circuits with extensive participation by *amici curiae*.[3] Thus, the circuit split has developed not

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[2] In fact, one of the cases before the Fifth Circuit was a multi-state WARN Act class action. 31 F.3d at 237.

[3] The Chamber of Commerce of the United States of America participated as *amicus curiae* in the Third and Sixth Circuits. The following labor organizations participated as *amici curiae* in

because of any lack of ventilation of the pertinent issues, but rather because, as the dissenting member of *Halkias* panel acknowledged, "[t]his is a difficult case" and "[r]easonable minds can disagree about the proper outcome." *Halkias*, 31 F.3d at 241 (Wisdom, J., dissenting).[4] Accordingly, there is no reason to believe that further lower court review will shed additional light on the proper result in this case, and, therefore, this Court should now provide definitive guidance.

Moreover, in light of this Court's recent retroactivity decisions, it is particularly important that the circuit split not be allowed to fester. When this Court ultimately re-

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the Third, Fifth and/or Sixth Circuits: the Oil, Chemical and Atomic Workers International Union; the United Mine Workers of America; the NLG/Sugar Law Center for Economic & Social Justice; the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America; Automobile Mechanics' Local 701; the International Association of Machinists; and the United Steelworkers of America.

[4] The split in the circuits reflects the strong division of opinion in the district courts regarding the appropriate limitations period for WARN Act claims. *Compare United Mine Workers of America v. Peabody Coal Co.*, No. 92-CV-73 (W.D. Ky. 1993) (applying limitations period from § 10(b) of the NLRA to WARN Act claims), *aff'd*, 1994 WL 590188 (6th Cir. Oct. 31, 1994) *and Halkias v. General Dynamics Corp.*, 825 F. Supp. 123 (N.D. Tex. 1993) (same), *aff'd*, 31 F.3d 224 (5th Cir. 1994), *reh'g en banc granted*, 1994 WL 520351 (5th Cir. Sept. 22, 1994) *and Thomas v. North Star Steel Co.*, No. 4:CV-92-1507 (M.D. Pa. May 25, 1993) (same), *rev'd*, 32 F.2d 53 (3d Cir. 1994) *and Staudt v. Glastron, Inc.*, 8 Indiv. Empl. Rights Cas. (BNA) 462 (W.D. Tex. Feb. 23, 1993) (same), *aff'd*, 31 F.3d 224 (5th Cir. 1994), *rehg' en banc granted*, 1994 WL 520351 (5th Cir. Sept. 22, 1994) *and Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 809 F. Supp. 185 (E.D.N.Y. 1992) (same), *judgment entered*, 829 F. Supp. 561 (E.D.N.Y. 1993) *with Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Services, Inc.*, 830 F. Supp. 432 (N.D. Ill. 1993) (applying state limitations period to WARN Act claims) *and Frymire v. Ampex Corp.*, 821 F. Supp. 651 (D. Colo. 1993) (same) *and Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192 (E.D. Mich. 1993) (same).

solves the split, its decision will likely apply retroactively. *See, e.g., Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 366 (1991) [hereinafter *Lampf*]; *id.* at 370 (O'Connor, J., dissenting) (criticizing Court for applying federal limitations period to Rule 10b-5 claims retroactively). Hence, without immediate guidance from this Court, parties will be forced to expend tremendous resources litigating claims that may ultimately be deemed time-barred. More importantly, without immediate review by this Court, litigants may be stampeded into unnecessary early filing of WARN Act claims or may be lulled into filing claims after the six-month limitations period has expired.

In addition, until this Court decides which limitations period governs WARN Act claims, potentially time-barred plaintiffs will likely file claims in the courts of the Second and Third Circuits, where they can be assured (at least for the moment) that their claims will be governed by lengthy limitations periods. This forum shopping will burden the courts in these Circuits and will require employers, employees and unions to litigate claims in otherwise inconvenient forums. For all these reasons, it makes good sense for this Court to decide which limitations period governs WARN Act claims as soon as possible.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE ANALYTICAL FRAMEWORK ESTABLISHED BY THIS COURT FOR DECIDING A LIMITATIONS BORROWING QUESTION

In its recent statute of limitations decisions, this Court has required that both state and federal statutes be scrutinized to determine which provided the "closer analogy" to the statute at issue. For example, in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 148 (1987), this Court applied a Clayton Act limitations period to civil RICO claims because there was no "satisfactory state law analogue to RICO"; in contrast, RICO and the Clayton Act shared "similarities in purpose and structure." *Id.* at 152.

Similarly, in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), this Court ruled that the NLRA provided an analogy to "hybrid" claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, "more apt than any of the suggested state-law parallels." *Id.* at 169. And in *Reed v. United Transp. Union*, 488 U.S. 319 (1989), this Court borrowed state limitations periods for claims under Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2), because the claims were "readily analogized . . . to state personal injury actions," *id.* at 326, and federal law "d[id] not provide a more analogous statute," *id.* at 344.[5]

Lower courts, however, have failed to understand that both state and federal limitations periods must be considered before identifying the "closer analogy." For example, in the decision below, the Court of Appeals refused to borrow a limitations period from the NLRA on the ground that it did not provide a close enough analogy, even though the Court never bothered to decide whether any state law offered any analogy to the WARN Act. Similarly, in *United Paperworkers*, the Second Circuit rejected the analogy between the NLRA and the WARN Act before weighing state law alternatives. 999 F.2d at 56. Under this mode of analysis, courts will always borrow state limitations periods, because no two federal statutes are perfectly analogous, *i.e.*, there will always be some substantial differences between different federal statutes. Such a result is directly in conflict with this

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[5] In *Lampf*, a plurality of this Court ultimately ruled that a limitations period for a cause of action implied under a statute should be borrowed from elsewhere in the statute. 501 U.S. at 359. Therefore, though this Court implicitly recognized the need ordinarily to compare both state and federal analogies, it ruled in the particular circumstances of *Lampf* that "consideration of state-law alternatives [was] unnecessary." *Id.* at 362.

Court's decisions in *DelCostello* and *Agency Holding*. In light of the lower courts' failure to determine whether a different federal statute provides a "closer," rather than a perfect, analogy to a federal cause of action, this Court should grant review to make clear beyond any doubt the need to follow the mandated process for borrowing state limitations periods.

III. THE DECISION BELOW IS WRONG

Because the Court of Appeals disregarded this Court's statute of limitations rulings, it became unduly fixated on the differences between the NLRA and the WARN Act, despite their "family resemblance," and it failed to adequately weigh the litigation practicalities that favor a uniform federal limitations period.

First, the Court of Appeals incorrectly ruled that because "all WARN claims involve nearly identical fact patterns," a uniform limitations period was unnecessary (App., *infra*, 13a). The Court failed to recognize that although WARN Act claims may resemble each other, they have no analogy in state law. Thus, without a uniform limitations period, courts will be forced to choose from a host of potential limitations periods—none of which offers the slightest analogy to the WARN Act.[6] A uniform limitations period should govern the WARN Act "to avoid [this] intolerable 'uncertainty and time-consuming

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[6] In the case below, four Pennsylvania limitations periods had been suggested: the two-year period for enforcing civil penalties, the three-year period for bringing claims under the Pennsylvania Wage Payment and Collection Law, the four-year period for breach of an implied contract, and the six-year residual period (App., *infra*, 15a & n.5). Similarly, in *Halkias*, three Texas limitations periods were suggested: the two-year period for tort claims, the four-year period for contract claims, and the four-year residual statute. 31 F.3d at 234.

litigation.'" *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)).

Second, the Court of Appeals failed to see that the geographic character of the WARN Act (in particular, its broad venue provision) weighs heavily in favor of borrowing a limitations period from federal law. Under the WARN Act, unions can file claims anywhere an employer transacts business. 29 U.S.C. § 2104(a)(5). Indeed, in this case the Union opted to sue Crown in Pennsylvania for an alleged WARN Act violation at a Georgia plant, and the Union urged the adoption of a Pennsylvania limitations period. In addition, as the Fifth Circuit observed in *Halkias*, WARN Act class actions may involve claims from facilities in multiple states. 31 F.3d at 237. Hence, borrowing various state limitations periods for WARN Act claims would " 'present the danger of forum shopping and, at the very least, . . . would virtually guarante[e] . . . complex and expensive litigation . . . over what should be a straightforward matter.' " *Lampf*, 501 U.S. at 357 (quoting *Agency Holding Corp*, 483 U.S. at 154) (internal quotations omitted).

Finally, the Court of Appeals failed to consider the fact that the NLRA provides a "closer analogy" to the WARN Act than any state limitations period. The NLRA, like the WARN Act, requires employers to provide unions with advance notice of plant closings and similar managerial actions that result in the layoff of employees. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981) (employer must notify union to ensure meaningful opportunity to bargain over effects of closing). Although the NLRA does not specify a fixed amount of notice, the notice must be sufficiently in advance of the closing to allow meaningful negotiations before the actual closing. *Id.* at 682; *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir.) ("A concomitant element of 'meaningful' bargaining is timely notice to the union of the decision to close, so that good

faith bargaining does not become futile or impossible."), *cert. denied*, 464 U.S. 892 (1983).[7]

Thus, the NLRA imposes substantive obligations regarding plant closings that are remarkably similar to those contained in the WARN Act. The purposes of both the NLRA and the WARN Act in this area are the same —to ameliorate the effects that plant closings have on employees and to strike a balance between the interests of employers in running their businesses and the interests of employees who often suffer the consequences of such managerial decisions. *Compare Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1306-07 (8th Cir. 1988) (noting that NLRA requires advance notice of plant closings in part to protect employees from the "ravages of economic dislocation") *with* 20 C.F.R. § 639.1(a) (stating that WARN Act provides employees with "transition time to adjust to the prospective loss of employment"). Hence, the NLRA provides a "closer fit" with the WARN Act than any state law. *See Lampf*, 501 U.S. at 357.

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[7] Other similarities exist between substantive requirements imposed by both statutes. For example, under both the NLRA and the WARN Act, the amount of notice required may be reduced when the employer can demonstrate special circumstances. The WARN Act contains provisions which allow for a reduction of notice in exceptional circumstances. 29 U.S.C. § 2102(b). Caselaw under the NLRA is to the same effect. *See, e.g., Los Angeles Soap Co.*, 300 N.L.R.B. 289, 295 (1990) (notice excused when employer faces bona fide emergency); *Chippewa Motor Freight, Inc.*, 261 N.L.R.B. 455, 459-60 (1982) (two days' notice sufficient under NLRA when employer decided to close because of financial difficulties and promptly notified union of its decision).

The NLRA and the WARN Act also provide similar remedies for violations of their respective notice requirements. A violation of the WARN Act requires payment of back pay for each day of the violation. 29 U.S.C. § 2104(a)(1)(A). Similarly, the NLRB has established back pay as the remedy for an employer's failure to provide notice or otherwise to satisfy its effects bargaining obligations. *See, e.g., National Car Rental System, Inc.*, 252 N.L.R.B. 159, 164 (1980), *modified and enforced*, 672 F.2d 1182 (3d Cir. 1982).

CONCLUSION

If the current circuit split is allowed to fester, uncertainty would adversely affect all litigants:

> "Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."

Agency Holding Corp., 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.34). Moreover, the federal judicial system will be forced to bear the burden of significant forum shopping until the issue is finally decided. This Court should grant the petition to resolve the circuit split regarding the WARN Act's limitations period, to overturn the error of the decision below, and to provide the lower courts with continued guidance regarding the process of implying limitations periods for federal statutes without such provisions.

Respectfully submitted,

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November 8, 1994